STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 13, 2003
v	No. 239358; 239359 Wayne County Circuit Court
CURTIS O. JACKSON, Defendant-Appellant.	LC No. 01-007253; 01-003165

Before: Talbot, P.J., and White and Murray, JJ.

PER CURIAM.

In docket number 239358, defendant appeals of right his jury trial conviction of escape while awaiting trial, MCL 750.197, for which defendant was sentenced to two to four years in prison. In docket number 239359, defendant appeals his jury trial conviction of unlawfully driving away in a motor vehicle, MCL 750.413, for which he was sentenced to three to five years in prison. We affirm in both cases. This case is being decided without oral argument pursuant to MCR 7.214(E).

I. Docket Number 239359

This case involves a dispute between defendant and an acquaintance of his, Charlotte Williams. According to Williams' trial testimony, she "met" defendant on a telephonic "chat line" designed for single people interested in dating. According to Williams, on February 7, 2001, she and defendant started communicating on the "chat line." At that point, defendant and Williams arranged a meeting whereby Williams picked up defendant at his home on Thursday morning, February 8, 2001. After running some errands together in a 2000 green Ford Focus driven by Williams (but owned by her mother), Williams dropped defendant off with the understanding that the two would speak later that evening.

During a subsequent conversation that same day, it was agreed that Williams would pick defendant up shortly before midnight on Friday, February 9, 2001. After picking defendant up on February 9, Williams proceeded to a liquor store to obtain goods for defendant's uncle, and the two then proceeded to a park so they could talk. Williams testified that while parked in the vehicle in the park, defendant twice went outside to go to the bathroom and, upon his returning the second time, he pointed a gun in her face and said "bitch, give me your car" after which he drove off in the vehicle.

After defendant left with the car, Williams called 911 from a payphone, and then left the scene after one of her friends picked her up from the park. Rather than waiting for the police, Williams and her friend returned to the address where she had picked up defendant and asked defendant's uncle, Norman Jackson, as to the location of defendant. Having been unsuccessful in that regard, Williams testified that the next day she and her mother went to the police station to report the stolen vehicle. On this day defendant also called Williams and indicated to her that he intended to return the car.

The vehicle driven by Williams and taken by defendant was recovered on February 11, 2001.[1] There was evidence in the record that the police report made regarding the stolen vehicle was made by an Eva Wright.[2] Wright previously had a physical relationship with defendant and, at trial, defendant's position was that she had made the report because she was upset over a broken relationship.

Defendant called three witnesses at trial: Gregory King, Jr., Joseph Allen Harris and defendant's uncle, Norman Jackson. Both King and Harris testified that defendant and Williams had dated long before February 9, 2001. Jackson provided similar testimony and also testified that Williams was a frequent overnight guest at his home with defendant and that it was "not uncommon" for Williams to loan her keys to defendant. As noted, defendant was convicted by the jury of unlawfully driving away in a motor vehicle, for which he was sentenced to a term of three to five years in prison.

II. Docket Number 239358

The facts in this consolidated case arise out of defendant's incarceration pending trial in docket number 239359. Specifically, the evidence presented to the jury established that from February 11, 2001 until August 20, 2001 defendant was in custody at the Oakland County jail. On June 5, 2001, at approximately 4:30 a.m., Wayne County Sheriff's deputies transported defendant and another inmate, Joseph Harris, from the Oakland County jail to the Wayne County jail. Harris and defendant were handcuffed together inside the Sheriff's van during their transport to the Wayne County jail. Upon arriving at the Wayne County jail, the van was opened in order to remove Harris and defendant. Immediately upon the doors opening, defendant and Harris began running, with Harris taking the initiative. According to both deputies, soon after exiting and running from the van, defendant slipped his hand out of the handcuffs and continued running along with Harris. The deputies pursued both escapees for a couple of blocks, all the while ordering them to stop. The deputies were unable to catch either Harris or defendant, both of whom ultimately got into a waiting taxi cab and fled the scene. According to both deputies' testimony, they were aware that Harris was an escape risk as he had escaped five times previously.

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[1]There was testimony from a police witness that once recovered, a Daisy model 188 blue steele BB handgun with a pump slide was located in the vehicle.

[2] It is not clear from the record whether Eva Wright was Williams' mother, or whether Wright made a separate report.

During trial defendant attempted to establish that he had no intent to escape, but instead did so because he was handcuffed to Harris (who allegedly initiated the escape) and he continued even after being separated from Harris because the deputies were firing their weapons.[3] In support of this defense, defendant testified on his own behalf. According to defendant, Harris began pulling defendant immediately upon the van door opening and dragged defendant with him as he fled. Defendant testified that even after Harris broke out of the handcuffs, he continued running because he heard gunfire. Defendant admitted that he got into a cab with Harris and was then subsequently dropped off at his girlfriend's house, and several hours later called his mother and told her to turn him into the police. Although defendant did not try to run or resist in any way when police arrived several hours later, he did give them a false name because he was allegedly being threatened with other charges. Also testifying on defendant's behalf was Norman Jackson (defendant's uncle). Jackson testified that he was in contact with defendant's mother shortly after the escape, and was aware of defendants thereabouts and his desire to turn himself in. According to Jackson, he gave defendant's address to the authorities.[4] As previously noted, defendant was convicted by a jury and was sentenced to serve two to four years in prison.

III. Analysis

A. Docket Number 239539

Defendant claims that the trial court's allowing two defense witnesses, King and Harris, to be brought into the courtroom wearing handcuffs and/or shackles violated his constitutional right to a fair trial and caused substantial prejudice toward his defense. The trial court denied defendant's motion for a mistrial on this issue. "We will review a trial court's decision to handcuff or shackle a witness for an abuse of discretion." *People v Banks*, 249 Mich App 247, 257; 642 NW2d 351 (2002). If we conclude that the trial court did abuse its discretion, we nonetheless will not reverse defendant's conviction on the basis of a preserved, non-constitutional error "unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *Id.* at 259-260, quoting *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999) in turn quoting MCL 769.26.

In *Banks, supra*, we examined for the first time a trial court's decision to allow a defense witness to testify while in handcuffs. After citing a plethora of court decisions from our sister states, we held that the same standards governing the placing of physical restraints on defendants applied to the placing of physical restraints on witnesses. *Id.* at 257. In so holding, we set forth the following rule applicable to this case:

> Accordingly, we hold that in Michigan the propriety of handcuffing or shackling a testifying witness is subject to the same analysis as that for defendants, i.e., the

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[3] The deputies testified that they did not fire any warning shots in an effort to stop the escape, pursuant to sheriff department policy.

[4] According to police, nobody reported Jackson's address to them; rather, the information was obtained from defendant's records.

> handcuffing or shackling of a witness during trial should be permitted only to prevent the escape of the witness, to prevent the witness from injuring others in the courtroom, or to maintain an orderly trial. [*Id.*]

In the instant case, defense witness Harris was brought into the courtroom in both hand and feet shackles. Outside the presence of the jury, defense counsel requested that the shackles be removed from Harris since it was possible an alternative remedy existed to address Harris' flight risk – having an adequate number of deputies in the courtroom to prevent any escape. The court ruled that Harris would remain shackled because the corrections officials recommended that he remain shackled and in his prison uniform because he was "extremely high security risk."

The evidence presented revealed that Harris had escaped from jail or prison at least five times previously and was co-defendant in docket number 239358. In light of the record establishing that Harris had repeatedly escaped from jail or prison in the past, and the Department of Corrections' recommendation that Harris remain shackled and in his prison uniform because of his "extremely high security risk," we conclude that the trial court did not abuse its discretion in ordering Harris to remain in his shackles so as "to prevent the escape of the witness." *Banks, supra* at 257.

The situation involving defense witness King is a more difficult one. With respect to witness King, the record reveals that a Michigan State trooper initially brought King into the courtroom in handcuffs while the jury was still present. The trial court excused the jury, and then stated the following to the trooper:

> THE COURT: Trooper McWilliams, we didn't want the jury to see him coming in in cuffs, so if you could just hold him in the back we will be able to get to him in probably about five minutes. We have the evidence technician and then him.

Thereafter, King testified. After his testimony, defendant moved for a mistrial on the basis that the "trooper [was] carting him out" in front of the jury:

> MR. NOBLE: (defense counsel): Your Honor, I move for a mistrial. It happened a second time. The jury is sitting there and the trooper is carting him out. They know he is locked up. The first time it happened, the troopers brought him out in front of the jurors. I think that is extremely prejudicial to my client's case.
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> THE COURT: He's a witness. He is not a party. Mr. Jenkins, do you have anything to say on that?
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> MR. JENKINS (the prosecutor): I would agree with the court's assessment, Judge. He's played an extremely limited role in this matter, I mean as far as his testimony, his testimony is really not going to any of substance with respect to the charges in this case, and I don't believe that the jurors seeing the little bit that they saw would in any way prejudice the rights of the defendant.

The court agreed with the prosecutor's argument, and denied defendant's motion for a mistrial.

Although from the trial court's statements it appears that King was brought into the courtroom by the trooper in the presence of the jury, it is not clear whether King was removed by the trooper with or without handcuffs. Nevertheless, it is clear from the trial court's comments that King was brought into the courtroom in handcuffs, and was at a minimum led out of the courtroom by a trooper. However, complicating this issue is the fact that there does not appear to be a ruling by the trial court indicating that King should be handcuffed during his testimony or that he was handcuffed during his testimony. Indeed, we conclude that he must not have been or defendant would have brought that record evidence to our attention. That being the case, what we are actually dealing with is the impact of the trooper's decision to bring King into the courtroom while handcuffed.

Regardless of how King was presented to the jury, we do not believe the trial court's decision in denying a mistrial was an abuse of discretion. This is so because unlike in *Banks*, the testimony offered by King was not critical to defendant's case. Rather, King only testified that defendant and Williams had dated before February 9, 2001. Although this touches on one minor aspect of Williams' testimony, it does not directly address what occurred between Williams and defendant on February 9, 2001. Further, two other witnesses, including defendant's uncle, testified to defendant's prior relationship with Williams, and, given the jury's verdict finding defendant guilty of UDAA, rather than armed carjacking, it is reasonable to assume that the jury credited defendant's witnesses to some degree, and did not dismiss their testimony simply because two of them were in restraints. In other words, after an examination of the entire case, we do not believe that it is more probable than not that the error was outcome determinative. *Lukity, supra.* Accordingly, we affirm in docket number 239359.

B. Docket Number 239358

In this case, defendant argues that the trial court erred in failing to give a jury instruction on the defense of duress. A trial court is required to instruct the jury concerning the law applicable to the case and to fully and fairly present the case to the jury in an understandable manner. MCL 768.29; *People v Mills*, 450 Mich 61, 80; 537 NW2d 909, modified 450 Mich 1212 (1995). Jury instructions must include all of the elements of the charged offense and must not exclude material issues, defenses, and theories if there is evidence to support them. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). However, before a defendant is entitled to a duress instruction, defendant must put forth a "prima facie" case of duress involving all of the elements of that defense. *People v Lemons*, 454 Mich 234, 247-248; 562 NW2d 447 (1997). In *Lemons*, our Supreme Court set forth the following prima facie elements of a defense of duress:

> [A] defendant successfully carries the burden of production where the defendant introduces some evidence from which the jury could conclude the following:
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> > A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
> >
> > B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;

> C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act;
>
> D) The defendant committed the act to avoid the threatened harm.
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> [*Id.* at 246-247 (citations and footnote omitted).]

In addition, the threatening conduct or act of compulsion must be "present, imminent, and impending" as "a threat of future injury is not enough." *Id.* at 247. Moreover, the threat must have arisen without fault on the part of the individual seeking to use the defense. *Id.*

We conclude that defendant was not entitled to an instruction on duress because there were no facts to support such a defense. To the extent defendant claims that he fled because the deputies were firing warning shots at he and Harris, the duress defense would be unavailable because it was defendant's own decision to continue running after he was physically separated from Harris. Thus, it was his own fault that any shots were fired. *Id.* Additionally, there was no evidence of any threat of imminent harm at the time defendant left with Harris from the van. *Id.* As such, the trial court did not err in refusing to give the instruction.

Affirmed.

/s/ Michael J. Talbot
/s/ Helene N. White
/s/ Christopher M. Murray